UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	(Consolidated)
	§	
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
vs.	§	
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	

MOTION OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

William H. Knull, III
MAYER, BROWN, ROWE & MAW
700 Louisiana Street
Suite 3600
Houston, Texas 77002
(713) 221-1651

Alan N. Salpeter
Michele Odorizzi
Mark McLaughlin
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Dated: April 29, 2003

#1357

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Canadian Imperial Bank of Commerce ("CIBC") hereby moves for summary judgment on the claims made against it in the *Newby* Consolidated Complaint, on the grounds that it is not a proper party to this suit. The undisputed facts show that CIBC did not engage in the conduct alleged to be in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, and Section 11 of the Securities Exchange Act of 1933, and that any such conduct by its subsidiaries cannot be imputed to CIBC. CIBC is therefore entitled to judgment as a matter of law, dismissing it from this suit.

INTRODUCTION

On December 20, 2002, this Court denied CIBC's motion to dismiss the Consolidated Complaint, finding that plaintiffs' "specific assertions * * *, if true, would constitute primary violations of § 10b and Rule 10b-5" and adequately state "Section 11 claims grounded in negligence and/or fraud." Slip op. 290, 304-305. Although sustaining plaintiffs' claims under the pleading standard articulated by the Court, the Court instructed CIBC and the other bank defendants that "if [they] object to being named defendants because a subsidiary or other entity was the real party in interest, they should file appropriate motions." 1/27/03 Order 2; see also 12/20/02 Slip op. 177 n. 85 ("if CIBC wishes to challenge Lead Plaintiff for naming the wrong party as a defendant," it should file a motion). The present motion addresses the absence of a factual basis for plaintiffs' claims against CIBC.

Summary judgment should be entered for CIBC for the simple reason that it did not engage in those actions alleged to run afoul of the securities laws. Nor can any suggested "fraud" by its subsidiaries be assigned to CIBC. The evidence, without contradiction, establishes that CIBC and its constituent corporations are separate entities with their own business

functions—and their own legal identities. In short, CIBC has not committed, and is not responsible for, any actionable conduct here. Because there is "no genuine issue as to any [of these] material fact[s]," CIBC is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; see, *e.g.*, *Certain Underwriters at Lloyd's* v. *Oryx Energy Co.*, 203 F.3d 898, 900 (5th Cir. 2000) (reciting standard); *R&B Falcon Corp.* v. *American Exploration Co.*, 154 F. Supp. 2d 969, 972 (S.D. Tex. 2001) (once moving party meets its Rule 56 burden, nonmoving party must come forward with specific evidence showing there is a genuine issue for trial).

STATEMENT OF FACTS

Canadian Imperial Bank of Commerce is a diversified financial institution, federally incorporated in Canada and headquartered in Toronto. CIBC 2002 Annual Report 136 ("Annual Report," excerpts attached as Ex. 1); Pettipas Aff. ¶¶ 3.[1] CIBC has major business operations throughout the world. It is the parent company of numerous subsidiaries located throughout North America, as well as in Europe, Asia, and the West Indies. Annual Report 16, 119. In general, CIBC and its other affiliated companies own 100% of the voting shares of each subsidiary. *Id.* at 119. Those subsidiaries are separate legal entities from CIBC (and each other), all independently operated and incorporated. See, *e.g.*, *id.*; Pettipas Aff. ¶¶ 3-6.

Among CIBC's present and former subsidiaries are several corporations which engaged in the transactions that are alleged by plaintiffs to have assisted in creating and propping up the so-called Enron "house of cards." Compl. ¶ 18. Those subsidiaries are CIBC World Markets Corp., a securities dealer, investment bank, and asset manager, which conducted business under the name CIBC Oppenheimer Corp. between 1997 and 1999 (Bourdon Aff. ¶¶ 3-4); CIBC Capital Corporation, which manages equity investments and provides investment advice

[1] The affidavits of CIBC and its subsidiaries are attached to CIBC's separate Statement of Undisputed Material Facts ("SOF") as Tabs 1-6.

(Renihan Aff. ¶ 4); CIBC World Markets plc, which was known as CIBC Wood Gundy, plc until May 1999, and engages (or has engaged) in securities underwriting, commercial lending, and similar such services (Austin Aff. ¶¶ 3-4); and CIBC INC., which provides commercial lending and related financial services (Brown Aff. ¶¶ 3-4).

The following table sets out the allegations against "CIBC," specifically identifying the undisputed facts which demonstrate the involvement of these CIBC-related entities—and not CIBC itself—in the Enron transactions:

Allegations Against CIBC	**Undisputed Facts**[2]
CIBC and/or its top executives invested in LJM2, sometimes secretly so. Compl. ¶¶ 29, 461, 647, 715, 731-732.	Upon formation of LJM2, CIBC Capital Corporation became a limited partner in that company, but CIBC, its employees, "top executives," and affiliated entities did not invest in LJM2, either secretly or otherwise. Martinez Aff. ¶¶ 13, 32.
CIBC underwrote (i) Enron capital preferred shares offerings in November 1993, July 1994, and January 1997, (Compl. ¶ 718); (ii) Enron common stock offerings in May 1998 and February 1999, (Compl. ¶¶ 48, 718); and (iii) an Enron note offering in May 1999, (Compl. ¶¶ 48, 151, 718, 723, 1006).	The November 1993, July 1994, and January 1997 capital preferred share offerings were underwritten by Oppenheimer & Co., an entity completely unrelated to CIBC. Martinez Aff. ¶¶ 28; Bourdon Aff. ¶ 3. The May 1998 and February 1999 common stock offerings were underwritten by CIBC Oppenheimer Corp., (Martinez Aff. ¶¶ 26-27), and the May 1999 note offering was underwritten by CIBC World Markets Corp., (*id.* ¶ 24).[3] CIBC was not an underwriter of any Enron securities, including but not limited to those alleged in the Complaint. *Id.* ¶¶ 9, 17-19.

[2] The particular CIBC affiliate, if any, involved in each alleged Enron-related transaction is detailed in the Affidavit of Lucia Martinez (Tab 2 to SOF), as cited in this column, and consolidated in table form in paragraph 5 of CIBC's Statement of Undisputed Material Facts.

[3] CIBC acquired Oppenheimer Holdings, Inc., the sole shareholder in Oppenheimer & Co., in November 1997, renaming the entity CIBC World Markets Corp. in 1999. Bourdon Aff. ¶ 3.

Allegations Against CIBC	Undisputed Facts
CIBC was an "active and knowing participant" in Project Braveheart (EBS Content Systems, LLC), a partnership related to Enron's joint venture with Blockbuster. CIBC loaned Braveheart $15 million and, with Enron, "controlled" the project. Compl. ¶¶ 522, 725-730.	CIBC did not participate in Enron's venture with Blockbuster VOD, assist in creating EBS Content Systems LLC/Project Braveheart, or loan $115 million to the project. Martinez Aff. ¶ 20.
CIBC issued analyst reports regarding Enron. Compl. ¶¶ 29, 113, 120, 132, 148, 161, 176, 183, 194, 199, 207, 230, 251, 269, 323, 334, 349, 372, 715, 724, 734.	CIBC World Markets Corporation issued the research reports regarding Enron that, in the Complaint, are attributed to "CIBC." Martinez Aff. ¶ 22. CIBC did not issue, or in any way contribute to, those or any other analyst reports related to Enron. *Id.* ¶ 7.
CIBC ran the NewPower IPO as lead underwriter, created Hawaii 125-0, made loans to Hawaii 125-0, and received a total return swap guaranty. Compl. ¶¶ 42, 49, 487, 721, 731, 893.	CIBC World Markets Corporation was an underwriter in the NewPower IPO. Martinez Aff. ¶ 23. CIBC INC. held equity certificates in the Hawaii 125-0 Trust and the Hawaii I 125-0 Trust. *Id.* ¶ 35. CIBC did not underwrite the October 2000 New Power IPO, "create" Hawaii 125-0, or hold any equity certificates in the Hawaii 125-0 Trusts. *Id.* ¶¶ 8, 16.[4]
CIBC participated in the July 2001 6.31% and 6.19% offerings of, respectively, Marlin Water Trust II and Marlin Water Capital Corp. II Notes. Compl. ¶¶ 49, 720.	CIBC World Markets Corp. was an initial purchaser in the 6.31% offering, (Martinez Aff. ¶ 25), and CIBC World Markets plc was an initial purchaser in the 6.19% offering (*id* ¶ 29). CIBC did not underwrite, or participate as an initial purchaser in, the July 2001 Marlin Water Trust II and Marlin Water Capital Corp. II Notes Martinez Aff. ¶¶ 6, 10.

[4] CIBC did loan money to the Hawaii 125-0 Trusts, (Martinez Aff. ¶ 5), an action which does not suffice to name CIBC as a defendant in this case. See *infra* p. 8 n.5.

Allegations Against CIBC	Undisputed Facts
While acting as an underwriter, CIBC made "false and misleading statements" in registration statements and prospectuses for Enron securities. Compl. ¶ 723	Oppenheimer & Co., CIBC Oppenheimer Corp., and CIBC World Markets Corp. were underwriters of those offerings, not CIBC. Martinez Aff. ¶¶ 9, 17-19, 24, 26-28. CIBC did not issue, or in any way contribute to, registration statements and prospectuses filed in connection with the Enron offerings described in the Complaint. *Id.* ¶ 21.
CIBC was a principal lender to Enron in transactions occurring in November 1997 (credit facility), July 1998 (loan to Enron subsidiary), September 1998 (credit facility), and August 2001 (credit facility). Compl. ¶ 719.	CIBC Wood Gundy plc was a lender in November 1997 and November 1998 (not July 1998) credit facility agreements with Enron. Martinez Aff. ¶¶ 30-31. CIBC INC. was a lender in August 1998 (not September 1998) under a credit facility agreement with Enron. *Id.* ¶ 33. As of August 2001, CIBC INC. was one of the lenders under two additional credit facility agreements with Enron. *Id.* ¶ 34. CIBC did not operate as one of the "principal commercial lending banks to Enron" during the class period—CIBC was not one of the lenders under (i) credit facility agreements with Enron Corp. and Enron Europe Limited in November 1997 and July or November 1998, or (ii) credit facility agreements with Enron Corp. in August 1998 and August 2001. *Id.* ¶¶ 11-12, 14-15.

The Complaint, without justification, treats CIBC as indistinguishable from each of these subsidiaries, alleging that CIBC is liable as a "large integrated financial services institution" that "through its controlled subsidiaries and divisions" provided "services to Enron" and committed "fraud." Compl. ¶ 103. However, the undisputed facts show that there is no basis for disregarding the separate corporate entities of CIBC and its affiliates; each has its own legal identity. In addition to operating in different segments of the financial markets and supplying discrete services, the CIBC subsidiaries described above were formed at different times and in varying circumstances. CIBC INC. was incorporated in 1987 (initially under the name CIBC

Financial Services, Inc.), and CIBC Capital Corporation in 1988. Both are Delaware corporations, headquartered in New York, New York. Brown Aff. ¶ 3; Renihan Aff. ¶ 3. CIBC World Markets Corp. is also a Delaware corporation, with its main offices in New York, but a distinct history. In 1997, a CIBC subsidiary acquired Oppenheimer Holdings, Inc. and the two entities merged operations to become CIBC Oppenheimer Corp.; the name-change to CIBC World Markets Corp. took place in 1999. Bourdon Aff. ¶ 3. The entity currently doing business as CIBC World Markets plc is a British company, incorporated in 1992, with its main offices in London, England. Austin Aff. ¶ 3.

As distinct corporations with their own particular focus and purposes, these CIBC subsidiaries have consistently functioned as autonomous business units. Typical of the parent-subsidiary relationship, a constituent company may have some close ties with CIBC, such as through stock ownership, a certain overlap in officers and employees, and consolidation of financial information for reporting purposes (*e.g.*, federal taxes, annual reports). However, while CIBC subsidiaries, these corporations carefully maintain their own identities and businesses by, for instance, being fully capitalized, generating their own revenues, separately keeping their books and records, managing their day-to-day operations, and conducting their own board meetings. See Bourdon Aff. ¶¶ 3-6; Renihan Aff. ¶¶ 3-6; Austin Aff. ¶¶ 3-6; Brown Aff. ¶¶ 3-6.

As detailed in the supporting affidavits and demonstrated below, CIBC, the parent company, was not a participant in the years-long Enron "scheme" which plaintiffs complain violated the securities laws. See, *e.g.,* Statement of Undisputed Material Facts ("SOF"), Tab 2 (Martinez Affidavit); SOF ¶ 5. Nonetheless, that is the only CIBC-related entity that plaintiffs have sued. See SOF ¶¶ 2-4.

ARGUMENT

CIBC IS ENTITLED TO JUDGMENT ON THE CONSOLIDATED COMPLAINT BECAUSE IT IS NOT A PROPER PARTY TO THIS SUIT

A. CIBC Did Not Engage In Conduct In Violation of the Securities Laws.

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation * * * is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (citation omitted). There is nothing in Sections 10(b) or 11 of the Securities Exchange Acts or Rule 10b-5 that changes this well-settled rule. In the securities law context, courts have consistently held that the plaintiff "must show how [the parent] committed the wrongdoing alleged." *Zishka* v. *American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 WL 1310529, at *4 (N. D. Tex. Sept. 13, 2000). See also, *e.g, McNamara* v. *Bre-X Minerals Ltd.*, 197 F. Supp. 2d 622, 673 (E.D. Tex. 2001) (parent corporation cannot automatically be held liable for subsidiary's fraud); *Abbell Credit Corp.* v. *Bank of Am. Corp.*, No. 01 C 2227, 2002 WL 335320, at *4 (N.D. Ill. Mar. 1, 2002) (same). Whether a parent or subsidiary has "defrauded plaintiffs are [two] different questions." *Chill* v. *General Elec. Corp.*, 101 F.3d 263, 268 (2d Cir. 1996).

Of the numerous separate and diversified CIBC entities, plaintiffs have named the parent company alone as a defendant in this case. See, *e.g.*, Compl. ¶¶ 1(d), 17. Yet the facts indisputably show that CIBC did not engage in the course of conduct that this Court has deemed sufficient—at least at the motion-to-dismiss stage—to sustain plaintiffs' Complaint. See Slip op. 290-293, 304-305 (listing allegations). As fully set out in the table at pages 3-5 of this brief, the uncontroverted facts prove CIBC's lack of involvement in the transactions plaintiffs attribute to "CIBC." CIBC was not a "principal lender" to Enron during the class period. CIBC did not underwrite, participate as an initial purchaser, or otherwise invest in the various Enron-related

deals or securities offerings described in the Complaint, including but not limited to LJM2, the NewPower IPO, the Marlin Water Notes, and the Blockbuster VOD venture. See, *e.g.,* Martinez Aff. ¶¶ 4-21. Nor did CIBC issue analyst reports, registration statements, or prospectuses in connection with Enron and Enron offerings. *Id.*[5]

To the extent that the alleged Enron dealings involved CIBC entities in any meaningful way, it was CIBC subsidiaries. See, *e.g.,* SOF ¶ 5; Martinez Aff. ¶¶ 22-35. Plaintiffs cannot raise any genuine issue of material fact that would suggest otherwise. Indeed, the identity of the CIBC-related entity that was involved in the actions that plaintiffs challenge (*e.g.*, issuing analysts reports) should have been obvious to plaintiffs at the time the Complaint was filed, from very limited investigation and readily-available public documents. For example, the analyst reports are prominently headlined "CIBC World Markets" and clearly explain that they are issued by CIBC World Markets Corp., a wholly-owned subsidiary of CIBC, and not CIBC itself. See Ex. 2. Likewise, easily accessible prospectuses and registration statements disclose the companies (including specific CIBC subsidiaries) involved in the underwriting and issuance of Enron-related securities. See, *e.g.,* Ex. 3; Martinez Aff. ¶¶ 23-24. Even a quick internet search on the SEC or EDGAR websites would have revealed this information.

What that sort of inquiry would have shown—and the affidavits filed with this motion irrefutably show—is that CIBC is not responsible for the actions that plaintiffs contend "artificially inflat[ed] the trading prices of Enron's publicly traded securities," (Compl. ¶ 724),

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[5] CIBC's single connection to Enron, lending money to the Hawaii 125-0 Trusts, cannot implicate CIBC in any grand "Ponzi scheme." Compl. ¶ 722. Such an innocuous action, undertaken in the ordinary course of business, is far from enough to constitute a claim under 10(b)(5) which, as this Court has held, requires a significant material and fraudulent act in furtherance of the deceptive scheme. See, *e.g.* Slip. op. 272-273. Given the distance appropriately maintained between CIBC and its subsidiaries, CIBC's loans cannot be said to be part of any suspect course of conduct or "scheme" at all. See *infra* pp. 9-13.

and "continue[d] the operation of the Enron Ponzi scheme," Compl. ¶ 725. Plaintiffs made a considered, though erroneous, decision to sue CIBC. The undisputed facts reveal that CIBC is entitled to judgment. See *Chill*, 101 F.3d at 268 (where § 10(b) and Rule 10b-5 claims were premised solely on false statements by subsidiary, plaintiff had no case against parent corporation).

B. CIBC Cannot Be Held Liable for the Alleged Wrongful Acts of Its Independent Subsidiaries.

In an effort to manufacture claims against CIBC and reach into its perceived "deep pockets," the Complaint tries to blur the distinction between the parent company and its affiliates. Plaintiffs define the term "CIBC" as comprising not only Canadian Imperial Bank of Commerce but also every one of its "controlled subsidiaries and divisions (such as CIBC Oppenheimer or CIBC World Markets)," (Compl. ¶ 103), and maintain that the "knowledge and liability" of any particular member of the CIBC corporate family must be "determined by looking at CIBC as an overall legal entity," Compl. ¶ 717. These assertions of parent "control" and shared corporate knowledge are unsubstantiated for a simple reason: there is no legal or factual justification for treating CIBC and its subsidiaries as a "single economic entity" in meting out responsibility for the alleged securities fraud. *Gabriel Capital, L.P.* v. *NatWest Finance, Inc.*, 122 F. Supp. 2d 407, 432 (S.D.N.Y. 2000) (parent may be liable under § 10(b) for statements by its subsidiary only if corporate form may be ignored).

Because each corporation is deemed to have its own legal personality, it is ordinarily presumed that a subsidiary has not surrendered its corporate identity to its parent. Thus a party seeking to hold a parent liable for the acts of a subsidiary has the burden of "overcoming the presumption of separateness by clear evidence." *Carballo Rodriguez* v. *Clark Equip. Co.*, 147 F. Supp. 2d 63, 65 (D. P.R. 2001). Accord *Kaplan* v. *First Options of Chicago, Inc.*, 19 F.3d 1503,

1522 (3d Cir. 1994) ("Because alter ego is akin to and has elements of fraud, we think it too must be shown by clear and convincing evidence"). That is a "significant burden"—one that plaintiffs cannot meet. *In re Alta Indus., Inc.*, 53 B.R. 567, 569 (Bankr. W.D. Tex. 1985); *Loral Fairchild Corp.* v. *Victor Co. of Japan Ltd.*, 803 F. Supp. 626, 632 (E.D.N.Y. 1992) (burden rests with party seeking to dispense with corporate fiction).

Whether CIBC's corporate form should be disregarded is judged by the law of its place of incorporation, that of Canada. *Amoco Chemical Co.* v. *Tex Tin Corp.*, 925 F. Supp. 1192, 1201 & n.9 (S.D. Tex. 1996) (applying Texas choice-of-law principles and citing Restatement (Second) of Conflicts of Laws § 307); Annual Report 136; Pettipas Aff. ¶ 3. Like all U.S. jurisdictions, Canada requires "exceptional" circumstances for a parent and subsidiary to be viewed as "alter egos."[6] *MT Dynamics, Inc.* v. *Sona Innovations, Inc.*, No. 02/CV/223634SR, 2002 CarswellOnt 3215, at ¶ 32 (Ont. Sup. Ct. of Justice Sept. 30, 2002) (a corporation's separate legal identity "cannot lightly be set aside"); *Meredith* v. *Regina* [2002] 3 C.T.C. 519, ¶ 12 (Fed. Ct. App.) ("Lifting the corporate veil is contrary to long-established principles of corporate law").[7] "Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under complete control of the parent and is nothing more than a conduit used by the parent to avoid liability." *Transamerica Life Ins. Co.* v.

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[6] Under the law of any other arguably relevant jurisdiction, the result would be the same. The forum state, Texas, and the places of incorporation of CIBC's subsidiaries, Delaware and England, all apply nearly identical principles to decide when a company's separate corporate existence should be discounted. See, *e.g.*, *Gardemal* v. *Westin Hotel Co.*, 186 F.3d 588, 593-594 (5th Cir. 1999) (granting summary judgment for parent company; no "alter ego" liability under Texas law because subsidiary was not "mere tool or business conduit" of parent); *United States ex. rel. Wilkins* v. *North American Constr. Corp.*, 173 F. Supp. 2d 601, 642 (S.D. Tex. 2001) (listing "alter ego" factors); *Amoco*, 925 F. Supp. at 1202 (Texas and Delaware law take into account abuse of the corporate form and domination of the affiliated entity); *Gabriel Capital*, 122 F. Supp. at 433 n.13 (English law will impose alter ego liability only where "'special circumstances exist indicating that the relationship of one corporation to another is a mere façade concealing the true facts'") (citation omitted).

[7] The cited Canadian cases are attached as Exhibit 4 hereto.

Canada Life Assurance Co. [1996] 28 O.R.3d 423, ¶ 20 (Ont. Ct. of Justice), *aff'd*, [1997] O.J. 3754 (Ont. Ct. App.). In other words, the "company [must have been] incorporated for an illegal, fraudulent or improper purpose." *MT Dynamics*, 2002 CarswellOnt 3215, at ¶ 32.

Plaintiffs' bald allegations of intercorporate unity rest on the incorrect assumption that the sort of "control" typical of parent-subsidiary relationships suffices to impute liability. See Compl. ¶ 103. However, "complete control" means that the subsidiary must be so dominated by the parent as to be a "mere puppet," without independent functions. *Transamerica* [1996] 28 O.R.3d 423, ¶ 22; *Robinson* v. *Daewoo Canada Ltd.*, No. 95-CQ-60575, 2000 CarswellOnt 3420, at ¶ 25, 29 (Ont. Sup. Ct. of Justice Sept. 28, 2000), *aff'd*, 2001 CarswellOnt 2047 (Ont. Ct. App. May 29, 2001). Factors to consider beyond the level of parent ownership in the subsidiary include whether the subsidiary is grossly undercapitalized, whether basic corporate formalities are observed, the corporate histories of parent and subsidiary, and the extent of dealings and director and officer overlap between the entities. *Robinson*, 2000 CarswellOnt 3420, at ¶ 26. Accord *Toronto (City) Bd. of Educ.* v. *Brunel Constr. 2000 Ltd.* [1997] O.J. 3783, ¶ 28 (Ont. Ct. of Justice).

The evidence here plainly demonstrates that during the class period, CIBC World Markets Corp., CIBC Capital Corporation, CIBC World Markets plc, and CIBC INC. were not just sham corporations designed to deflect fault from CIBC. All provided their own diverse services, from commercial lending to investment advice, which produced recognizable streams of revenue and resulted in their being adequately funded; ran their own their daily operations, chiefly without direction by, or commonality of, CIBC directors or officers; maintained their own books and records on a day-to-day basis; held individual board meetings; and were incorporated or acquired at different times, in different locations. See Pettipas Aff. ¶¶ 3-6;

Bourdon Aff. ¶¶ 3-6; Renihan Aff. ¶¶ 3-6; Austin Aff. ¶¶ 3-6; Brown Aff. ¶¶ 3-6. Neither CIBC's full or principal ownership stake in these subsidiaries nor the presence of some shared directors and officers or the filing of consolidated income tax returns is enough to tilt the balance in the other direction. See *Transamerica*, [1996] 28 O.R.3d 423, at ¶¶ 7, 22 (no basis for piercing corporate veil where subsidiary was 100% owned by parent and shared directors, but was independently managed, with "a business [that was] separate and distinct"). CIBC had a natural integration with these subsidiaries that still respected their separate corporate forms.

Even with far more interconnection, the CIBC entities could not be considered as one. There is no allegation, nor can any be made, that the CIBC subsidiaries were set up or run as a "conduit" for fraud—to "unjustly deprive claimants of their rights." *Id.* at ¶ 20. See also *Robinson,* 2000 CarswellOnt 3420, at ¶ 31 (granting summary judgment on alter ego claims; "where liability has been imposed on a party because of its ownership and control of another corporation, there has been a concern about conduct akin to fraud, especially where there has been a diversion of funds from the subsidiary"). As already explained, the supposed securities laws violations enumerated by plaintiffs, where they involve CIBC entities at all, relate to the conduct of CIBC subsidiaries. And nothing establishes that those subsidiaries lack the capacity, in appropriate cases, to provide redress, or that CIBC is using them "as a shield for some nefarious purpose," (*Transamerica.*, [1996] 28 O.R.3d 423, at ¶ 23), or a "vehicle for [its own] wrongdoing," *Meredith,* [2002] 3 C.T.C. 519, at ¶ 12.

Since there has been no abuse of the corporate form, plaintiffs cannot assign either knowledge or liability across CIBC corporate lines. CIBC and its affiliates have not relinquished their distinct identities; therefore, the amenability of each to suit must depend on its own actions. Judged by that standard, CIBC does not belong in this case. See, *e.g., Secon Serv. Sys., Inc.* v.

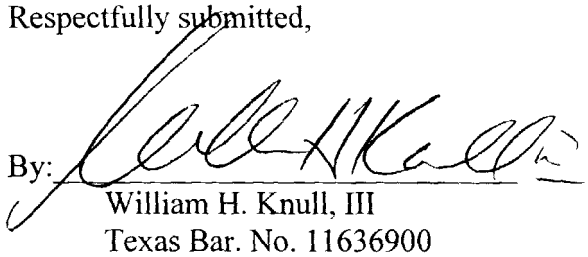
St. Joseph Bank & Trust Co., 855 F.2d 406, 416 (7th Cir. 1988) (granting summary judgment where plaintiff could not produce any evidence of alter ego liability); *Chill*, 101 F.3d at 267-270 (finding no scienter on part of parent due to subsidiary's apparent motive to commit fraud or parent's failure to investigate subsidiary's practices).

CONCLUSION

For all of the foregoing reasons, CIBC is entitled to judgment on the *Newby* Consolidated Complaint.

Dated: April 29 2003

Respectfully submitted,

By: 

William H. Knull, III
Texas Bar. No. 11636900
S.D. Bar No. 7701

700 Louisiana Street
Suite 3600
Houston, Texas 77002-2730
(713) 221-1651
(713) 224-6410 (Facsimile)
e-mail: cibc-newby@mayerbrownrowe.com

ATTORNEY IN CHARGE FOR
DEFENDANT CANADIAN IMPERIAL
BANK OF COMMERCE

OF COUNSEL:

MAYER, BROWN, ROWE & MAW
700 Louisiana Street
Suite 3600
Houston, Texas 77002-2730

-and-

Alan N. Salpeter
Michele Odorizzi
Mark McLaughlin
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
(312) 701-7711 (Facsimile)
e-mail: cibc-newby@mayerbrownrowe.com

ATTORNEYS FOR DEFENDANT
CANADIAN IMPERIAL BANK OF
COMMERCE

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2003, true and correct copies of the (1) Statement of Undisputed Material Facts of Defendant Canadian Imperial Bank of Commerce in Support of its Motion for Summary Judgment; and (2) Motion of Defendant Canadian Imperial Bank of Commerce for Summary Judgment have been served on all counsel in accordance with the Orders Regarding Service of Papers and Notice of Hearings via Independent Website entered on June 6, 2002 and August 7, 2002.

Mark D. Manela

Lynn Lincoln Sarko **VIA WEBSITE** KELLER ROHRBACK, LLP 1201 Third Avenue, Suite 3200 Seattle, WA 98101-3052 206/623-1900 206/623-3384 (fax) e-mail: lsarko@kellerrohrback.com Co-Lead Counsel for *Tittle* Plaintiffs	Roger B. Greenberg **VIA WEBSITE** SCHWARTZ, JUNELL, CAMPBELL & OATHOUT, LLP Two Houston Center 909 Fannin, Suite 2000 Houston, TX 77010 713/752-0017 713/752-0327 (fax) e-mail: rgreenberg@schwartz-junell.com Local Counsel for Securities Plaintiffs in *Newby*
William S. Lerach Helen J. Hodges Byron S. Georgiou MILBERG WEISS BERSHAD HYNES & LERACH, LLP 401 B Street, Suite 1700 San Diego, CA 92101-5050 619/231-1058 619/231-7423 (fax) - and - Melvyn I. Weiss Steven G. Schulman Samuel H. Rudman MILBERG WEISS BERSHAD HYNES & LERACH, LLP One Pennsylvania Plaza New York, NY 10119-0165 212/594-5300 212/868-1229 (fax) e-mail: enron@milberg.com Lead Counsel for Securities Plaintiffs in *Newby*	Steve W. Berman **VIA WEBSITE** Clyde A. Platt, Jr. HAGENS BERMAN, LLP 1301 Fifth Avenue, Suite 2900 Seattle, WA 98101 206/623-7292 206/623-0594 (fax) e-mail: steve@hagens-berman.com Co-Lead Counsel for *Tittle* Plaintiffs

Justin M. Campbell, III **VIA WEBSITE** CAMPBELL HARRISON & DAGLEY, LLP 4000 Two Houston Center, 909 Fannin Street Houston, TX 77010 713/752-2332 713/752-2330 (fax) e-mail: rharrison@chd-law.com Liaison Counsel for *Tittle* Plaintiffs	Thomas E. Bilek **VIA WEBSITE** HOEFFNER & BILEK, LLP 440 Louisiana, Suite 720 Houston, TX 77002 713/227-7720 713/227-9404 (fax) e-mail: tbilek722@aol.com Local Counsel for Securities Plaintiffs in *Newby*
James F. Marshall **VIA WEBSITE** JUDICIAL WATCH INC. 2540 Huntington Drive, Suite 201 San Marino, CA 91108-2601 626/287-4540 626/237-2003 (fax) e-mail: marshall@attglobal.net Attorneys for Plaintiff Ralph A. Wilt, Jr.	David R. Scott **VIA WEBSITE** SCOTT & SCOTT, LLC 108 Norwich Avenue Colchester, CT 06415 860/537-3818 860/537-4432 (fax) e-mail: drscott@scott-scott.com Attorneys for Plaintiff Archdiocese of Milwaukee
Jon Cuneo **VIA WEBSITE** THE CUNEO LAW GROUP, P.C. 317 Massachusetts Avenue, N.E., Suite 300 Washington, D.C. 20002 202/789-3960 202/789-1813 (fax) e-mail: jonc@cuneolaw.com Washington Counsel	George M. Fleming **VIA WEBSITE** FLEMING & ASSOCIATES 1330 Post Oak Blvd., Suite 3030 Houston, TX 77056-3019 713/621-7944 713/621-9638 (fax) e-mail: enron@fleming-law.com Attorneys for Individual Plaintiffs
Sherrie R. Savett **VIA WEBSITE** BERGER & MONTAGUE, P.C. 1622 Locust Street Philadelphia, PA 19103 215/875-3000 215/875-4604 (fax) e-mail: ssavett@bm.net Attorneys for Plaintiff Staro Asset Management	Robert M. Stern **VIA WEBSITE** O'MELVENY & MYERS, LLP 555 13th Street, N.W., Suite 500W Washington, DC 20004-1109 202/383-5300 202/383-5414 (fax) e-mail: rstern@omm.com Attorneys for Defendant Jeffrey Skilling
Thomas G. Shapiro **VIA UPS** SHAPIRO HABER & URMY LLP 75 State Street Boston, MA 02109 617/439-3939 617/439-0134 (fax) Attorneys for Plaintiff van deVelde	Robert C. Finkel **VIA UPS** WOLF POPPER LLP 845 Third Avenue New York, NY 10022 212/759-4600 212/486-2093 (fax) Attorneys for Plaintiff van deVelde

Scott Lassetter **VIA WEBSITE** WEIL, GOTSHAL & MANGES 700 Louisiana Street, Suite 1600 Houston, TX 77002 713/546-5000 713/224-9511 (fax) e-mail: scott.lassetter@weil.com Attorneys for Defendant Enron	Anthony C. Epstein **VIA WEBSITE** STEPTOE & JOHNSON, LLP 1330 Connecticut Ave., N.W. Washington, D.C. 20036 202/429-3000 202/429-3902 (fax) e-mail: aepstein@steptoe.com Attorneys for Defendants Philip J. Bazelides, Mary K. Joyce, James S. Prentice
Eric Nichols **VIA WEBSITE** BECK, REDDEN & SECREST, L.L.P. One Houston Center 1221 McKinney Street, Suite 4500 Houston, TX 77010 713/951-3700 713/951-3720 (fax) e-mail: enichols@brsfirm.com Attorneys for Defendants Michael J. Kopper, Chewco Investments, LJM Cayman, L.P.	Abigail K. Sullivan **VIA WEBSITE** BRACEWELL & PATTERSON, L.L.P. South Tower Pennzoil Place 711 Louisiana Street, Suite 2900 Houston, TX 77002-2781 713/223-2900 713/221-1212 (fax) e-mail: asullivan@bracepatt.com Attorneys for Defendant James V. Derrick, Jr.
Linda L. Addison **VIA WEBSITE** FULBRIGHT & JAWORSKI, LLP 1301 McKinney, Suite 5100 Houston, TX 77010 713/651-5628 713/651-5246 (fax) e-mail: laddison@fulbright.com Attorneys for Defendants The Northern Trust Company, Northern Trust Retirement Consulting LLC	John J. McKetta III **VIA WEBSITE** GRAVES, DOUGHERTY, HEARON & MOODY, P.C. 515 Congress Avenue, Suite 2300 Austin, TX 78701 512/480-5600 512/478-1976 (fax) e-mail: mmcketta@gdhm.com Attorneys for Defendant Rebecca Mark-Jusbasche
Billy Shepherd **VIA WEBSITE** CRUSE, SCOTT, HENDERSON & ALLEN, L.L.P. 600 Travis Street, Suite 3900 Houston, TX 77002-2910 713/650-6600 713/650-1720 (fax) e-mail: bshepherd@crusescott.com Attorneys for Defendants David Stephen Goddard, Jr., Debra A. Cash, Michael M. Lowther and Michael C. Odom	Jack C. Nickens **VIA WEBSITE** NICKENS, KEETON, LAWLESS, FARRELL & FLACK, LLP 600 Travis Street, Suite 7500 Houston, TX 77002 713/571-9191 713/571-9652 (fax) e-mail: trichardson@nlf-law.com Attorneys for Defendants Estate of J. Clifford Baxter, Deceased, Joseph M. Hirko, Paula Ricker, Kenneth D. Rice, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, J. Mark Metts, Steven J. Kean, Mark E. Koenig, Kevin P. Hannon and Lawrence Greg Whalley

James E. Coleman, Jr. **VIA WEBSITE** CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP 200 Crescent Court, Suite 1500 Dallas, TX 75201 214/855-3000 214/855-1333 (fax) e-mail: deakin@ccsb.com Attorneys for Defendant Kenneth Lay	Mark J. Rochon **VIA WEBSITE** Emmett B. Lewis MILLER & CHEVALIER 655 Fifteenth Street, N.W., Suite 900 Washington, D.C. 20005-5701 202-626-5819 202-628-0858 (fax) e-mail: mrochon@milchev.com Attorneys for Paulo V. Ferraz Pereira
Charles G. King **VIA WEBSITE** KING & PENNINGTON, L.L.P. 1100 Louisiana Street, Suite 5055 Houston, TX 77002-5220 713/225-8400 713/225-8488 (fax) e-mail: cking@kandplaw.com Attorneys for Defendants Bank of America Corp., Banc of America Securities LLC	William F. Martson, Jr. **VIA WEBSITE** TONKON TORP, LLP 888 S.W. Fifth Avenue, Suite 1600 Portland, OR 97204-2099 503/802-2005 503/972-7407 (fax) e-mail: enronservice@tonkon.com Attorneys for Defendant Ken L. Harrison
Jeremy L. Doyle **VIA WEBSITE** GIBBS & BRUNS, L.L.P. 1100 Louisiana, Suite 5300 Houston, TX 77002 713/650-8805 713/750-0903 (fax) e-mail: jdoyle@gibbs-bruns.com Attorneys for Defendants Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Charles A. LeMaistre, Wendy L. Gramm, Robert K. Jaedicke, Charls E. Walker, John Wakeham, John Mendelsohn, Frank Savage, Herbert S. Winokur, Jr., Jerome J. Meyer	Carolyn S. Schwartz **VIA UPS** United States Trustee, Region 2 33 Whitehall St., 21st Floor New York, NY 10004 212/510-0500 212/668-2255 (fax)
H. Bruce Golden **VIA WEBSITE** GOLDEN & OWENS, LLP 1221 McKinney Street, Suite 3150 Houston, TX 77010 713/223-2600 713/223-5002 (fax) e-mail: golden@goldenowens.com Attorneys for Defendant John A. Urquhart	Craig Smyser **VIA WEBSITE** SMYSER KAPLAN & VESELKA, L.L.P. 700 Louisiana Street, Suite 2300 Houston, TX 77002 713/221-2300 713/221-2320 (fax) e-mail: enronservice@skv.com Attorneys for Defendant Andrew Fastow

Rusty Hardin **VIA WEBSITE** RUSTY HARDIN & ASSOCIATES, P.C. 1201 Louisiana, Suite 3300 Houston, TX 77002 713/652-9000 713/652-9800 (fax) e-mail: rhardin@rustyhardin.com Attorneys for Defendants Arthur Andersen LLP, Arthur Andersen-Puerto Rico, Andersen LLP (Andersen-Cayman Islands), C.E. Andrews, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart and William E. Swanson	Jacalyn D. Scott **VIA WEBSITE** WILSHIRE SCOTT & DYER P.C. 3000 One Houston Center, 1221 McKinney Houston, TX 77010 713/651-1221 713/651-0020 (fax) e-mail: jscott@wsd-law.com Attorneys for Defendant Citigroup, Inc. and Salomon Smith Barney, Inc.
Sharon Katz **VIA WEBSITE** DAVIS POLK & WARDWELL 450 Lexington Avenue New York, NY 10017 212/450-4000 212/450-3633 (fax) e-mail: andersen.courtpapers@dpw.com Attorneys for Defendants Arthur Andersen LLP, Arthur Andersen-Puerto Rico, C.E. Andrews, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart, Michael D. Jones and William E. Swanson	Barry G. Flynn **VIA WEBSITE** LAW OFFICES OF BARRY G. FLYNN, PC 1300 Post Oak Blvd., Suite 750 Houston, TX 77056 713/840-7474 713/840-0311 (fax) e-mail: bgflaw@mywavenet.com Attorneys for Defendant David B. Duncan
Paul Vizcarrondo, Jr. **VIA WEBSITE** WACHTELL, LIPTON, ROSEN & KATZ 51 West 52nd Street New York, NY 10019 212/403-1000 212/403-2000 (fax) e-mail: pvizcarrondo@wlrk.com Attorneys for Defendants Banc of America Securities LLC and Salomon Smith Barney Inc.	Mark A. Glasser **VIA WEBSITE** KING & SPALDING 1100 Louisiana Street, Suite 4000 Houston, TX 77002-5213 713/751-3200 713/751-3290 (fax) e-mail: mkglasser@kslaw.com Attorneys for Defendant LJM2 Co-Investments

William Edward Matthews **VIA UPS** GARDERE WYNNE SEWELL LLP 1000 Louisiana, Suite 3400 Houston, TX 77002 713/276-5500 713/276-5555 (fax) Attorneys for Defendant Andersen Worldwide, S.C., Roman W. McAlindan and Philip A. Randall	Tom P. Allen **VIA WEBSITE** McDANIEL & ALLEN, APC 1001 McKinney Street, 21st Floor Houston, TX 77002 713/227-5001 713/227-8750 (fax) e-mail: tallen@mcdanielallen.com Attorneys for Defendant Ben F. Glisan, Jr.
John K. Villa **VIA WEBSITE** WILLIAMS & CONNOLLY, LLP 725 Twelfth Street, N.W. Washington, D.C. 20005 202/434-5000 202/434-5029 (fax) e-mail: jvilla@wc.com Attorneys for Defendants Vinson & Elkins, L.L.P, Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick, III	Robert Hayden Burns **VIA WEBSITE** BURNS WOOLEY & MARSEGLIA 1415 Louisiana, Suite 3300 Houston, TX 77002 713/651-0422 713/651-0817 (fax) e-mail: hburns@bwmzlaw.com Attorneys for Defendant Kristina Mordaunt
Bernard V. Preziosi, Jr. **VIA WEBSITE** CURTIS, MALLET-PREVOST, COLT & MOSLE, L.L.P. 101 Park Avenue New York, NY 10178-0061 212/696-6000 212/697-1559 (fax) e-mail: bpreziosi@cm-p.com Attorneys for Defendant Michael C. Odom	Scott B. Schreiber **VIA WEBSITE** ARNOLD & PORTER 555 Twelfth Street, N.W. Washington, D.C. 20004-1206 202/942-5000 202/942-5999 (fax) e-mail: enroncourtpapers@aporter.com Attorneys for Defendant Thomas H. Bauer
John W. Spiegel **VIA WEBSITE** MUNGER, TOLLES & OLSON 355 South Grand Avenue, 35th Floor Los Angeles, CA 90071 213/683-9100 213/683-5152 (fax) e-mail: enron@mto.com Attorneys for Defendants Kirkland & Ellis	Mark C. Hansen **VIA WEBSITE** KELLOGG, HUBER HANSEN, TODD & EVANS, P.L.LC. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 202/326-7900 202/326-7999 (fax) e-mail: mhansen@khhte.com Attorneys for Defendant Nancy Temple

Michael D. Warden **VIA WEBSITE** SIDLEY AUSTIN BROWN & WOOD, LLP 1501 K Street, N.W. Washington, D.C. 20005 202/736-8000 202/736-8711 (fax) e-mail: mwarden@sidley.com Attorney for Defendant D. Stephen Goddard, Jr.	Ronald E. Cook **VIA WEBSITE** COOK & ROACH, LLP Chevron Texaco Heritage Plaza 1111 Bagby, Suite 2650 Houston, TX 77002 713/652-2031 713/652-2029 (fax) e-mail: rcook@cookroach.com Attorney for Defendant Alliance Capital Management
Jack O'Neill **VIA WEBSITE** CLEMENTS, O'NEILL, PIERCE, WILSON & FULKERSON, LLP 1000 Louisiana, Suite 1800 Houston, TX 77002 713/654-7607 713/654-7690 (fax) e-mail: sutton@copwf.com Attorneys for Defendant Joseph W. Sutton	Andrew J. Mytelka **VIA WEBSITE** GREER, HERZ & ADAMS, L.L.P. One Moody Plaza, 18th Fl. Galveston, TX 77550 409/797-3200 409/766-6424 (fax) e-mail: amytelka@greerherz.com Attorneys for American National Plaintiffs
Amelia Toy Rudolph **VIA UPS** SUTHERLAND ASBILL & BRENNAN LLP 999 Peachtree Street, N.E., Suite 2300 Atlanta, GA 30309 404/853-8000 404/853-8806 (fax) Attorneys for Defendant Roger D. Willard	Gregory A. Markel **VIA UPS** CADWALADER, WICKERSHAM & TAFT LLP 100 Maiden Lane New York, NY 10038 212/504-6000 212/504-6666 (fax) Attorneys for Defendant Bank of America Corp.
Joel M. Androphy **VIA WEBSITE** BERG & ANDROPHY 3704 Travis Street Houston, TX 77002 713/529-5622 713/529-3785 (fax) e-mail: androphy@bahou.com Attorneys for Defendant Deutsche Bank AG	Lawrence Byrne **VIA WEBSITE** WHITE & CASE LLP 1155 Avenue of the Americas New York, NY 10036-2787 212/819-8200 212/354-8113 (fax) e-mail: lbyrne@whitecase.com Attorneys for Defendant Deutsche Bank AG

Richard Mithoff **VIA WEBSITE** MITHOFF & JACKS One Allen Center, Penthouse, 500 Dallas Houston, TX 77002 713/654-1122 713/739-8085 (fax) e-mail: enronlitigation@mithoff-jacks.com Attorneys for Defendant J.P. Morgan Chase & Co.	Bruce D. Angiolillo **VIA WEBSITE** SIMPSON THACHER & BARTLETT 425 Lexington Avenue New York, NY 10017-3954 212/455-2000 212/455-2502 (fax) e-mail: bangiolillo@stblaw.com Attorneys for Defendant J.P. Morgan Chase & Co.
Chuck A. Gall **VIA WEBSITE** JENKENS & GILCHRIST 1445 Ross Avenue, Suite 3200 Dallas, TX 75202-2799 214/855-4338 214/855-4300 (fax) e-mail: cgall@jenkens.com Attorneys for Defendant J.P. Morgan Chase & Co.	Mark A. Kirsch **VIA WEBSITE** CLIFFORD CHANCE US LLP 200 Park Avenue, Suite 5200 New York, NY 10166 212/878-8000 212/878-8375 (fax) e-mail: mark.kirsch@cliffordchance.com Attorneys for Defendants Alliance Capital Management and Merrill Lynch & Co., Inc.
Lawrence D. Finder **VIA WEBSITE** HAYNES AND BOONE, LLP 1000 Louisiana Street, Suite 4300 Houston, TX 77002-5012 713/547-2000 713/236-5520 (fax) e-mail: finderl@haynesboone.com Attorneys for Defendant Credit Suisse First Boston Corp.	Richard W. Clary **VIA WEBSITE** CRAVATH, SWAINE & MOORE 825 Eighth Ave. New York, NY 10019 212/474-1000 212/474-3700 (fax) e-mail: rclary@cravath.com Attorneys for Defendant Credit Suisse First Boston Corp.
John L. Murchison, Jr. **VIA WEBSITE** VINSON & ELKINS, L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002 713/758-2222 713/758-2346 (fax) e-mail: jmurchison@velaw.com	Taylor M. Hicks **VIA WEBSITE** Stephen M. Loftin HICKS THOMAS & LILIENSTERN, LLP 700 Louisiana, Suite 2000 Houston, TX 77002 713/547-9100 713/547-9150 (fax) e-mail: thicks@hicks-thomas.com sloftin@hicks-thomas.com Attorneys for Defendant Merrill Lynch & Co., Inc.

David H. Braff **VIA WEBSITE** SULLIVAN & CROMWELL LLP 125 Broad Street New York, NY 10004-2498 212/558-4000 212/558-3588 (fax) e-mail: enronpapers@sullcrom.com Attorneys for Defendant Barclays Bank PLC	Barry Abrams **VIA WEBSITE** ABRAMS SCOTT & BICKLEY, LLP 700 Louisiana, Suite 1800 Houston, TX 77002 713/228-6601 713/228-6605 (fax) e-mail: babrams@asbtexas.com Attorneys for Defendant Barclays Bank PLC
Brad S. Karp **VIA WEBSITE** PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP 1285 Avenue of the Americas New York, NY 10019-6064 212/373-3000 212/757-3990 (fax) e-mail: grp-citi-service@paulweiss.com Attorneys for Defendant CitiGroup, Inc. and Salomon Smith Barney, Inc.	Hugh R. Whiting **VIA WEBSITE** JONES, DAY, REAVIS & POGUE 600 Travis Street, Suite 6500 Houston, TX 77002-3008 832/239-3939 832/239-3600 (fax) e-mail: hrwhiting@jonesday.com Attorneys for Defendant Lehman Brothers Holding, Inc.
David F. Wertheimer **VIA WEBSITE** HOGAN & HARTSON, L.L.P. 875 Third Avenue New York, NY 10022 212/918-3000 212/918-3100 (fax) e-mail: dfwertheimer@hhlaw.com Attorneys for Defendant Debra A. Cash	Gary A. Orseck **VIA WEBSITE** ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER, L.L.P. 1801 K Street, N.W., Suite 411 Washington, DC 20006 202/775-4500 202/775-4510 (fax) e-mail: gorseck@robbinsrussell.com Attorneys for Defendant Michael M. Lowther
William H. Knull, III **VIA WEBSITE** MAYER, BROWN, ROWE & MAW 700 Houston Street, Suite 3600 Houston, TX 77002-2730 713/221-1651 713/224-6410 (fax) e-mail: cibc-newby@mayerbrownrowe.com Attorneys for Defendant Canadian Imperial Bank of Commerce	Alan N. Salpeter **VIA WEBSITE** MAYER, BROWN, ROWE & MAW 190 South LaSalle St. Chicago, IL 60603 312/782-0600 312/701-7711 (fax) e-mail: cibc-newby@mayerbrownrowe.com Attorneys for Defendant Canadian Imperial Bank of Commerce
Murray Fogler **VIA WEBSITE** McDADE FOGLER MAINES, LLP Two Houston Center, 909 Fannin, Suite 1200 Houston, TX 77010-1006 713/654-4300 713/654-4343 (fax) e-mail: mfogler@mfml.com Attorneys for Defendant Lou L. Pai	Harvey G. Brown **VIA UPS** ORGAIN BELL & TUCKER LLP 2700 Post Oak Blvd., Suite 1410 Houston, TX 77056 713/572-8772 713/572-8766 (fax) Attorneys for Defendants Andersen-United Kingdom and Andersen-Brazil

Stephen J. Crimmins **VIA WEBSITE** PEPPER HAMILTON LLP Hamilton Square 600 Fourteenth Street, N.W. Washington, DC 20005 202/220-1665 (fax) e-mail: crimminss@pepperlaw.com Attorneys for Defendant Kevin P. Hannon	Roger E. Zuckerman **VIA WEBSITE** ZUCKERMAN SPAEDER LLP 1201 Connecticut Avenue, N.W. Washington, DC 20026-2638 202/778-1800 202/822-8106 (fax) e-mail: enron@zuckerman.com Attorneys for Defendant Lou L. Pai
Elizabeth T. Parker **VIA WEBSITE** PEPPER HAMILTON LLP 3000 Two Logan Square, 18th & Arch Sts. Philadelphia, PA 19103 215/981-4000 215/981-4756 (fax) e-mail: parkere@pepperlaw.com Attorneys for Defendant Kevin P. Hannon	Mitchell A. Karlan **VIA WEBSITE** GIBSON DUNN & CRUTCHER, L.L.P. 200 Park Avenue New York, NY 10166-0193 212/351-4000 212/351-4035 (fax) e-mail: enronlitigation@gibsondunn.com Attorneys for Defendant Merrill Lynch & Co., Inc.
Herbert S. Washer **VIA WEBSITE** James Miller Ignatius Grande CLIFFORD CHANCE ROGERS & WELLS 200 Park Avenue, Suite 5200 New York, NY 10166 212/878-8000 212/878-8375 (fax) e-mail: herbert.washer@cliffordchance.com james.miller@cliffordchance.com ignatius.grande@cliffordchance.com Attorneys for Defendant Merrill Lynch & Co., Inc.	Michael G. Davies **VIA WEBSITE** HOGUET NEWMAN & REGAL, LLP 10 East 40th Street New York, NY 10016 212/689-8808 212/689-5101 (fax) e-mail: mdavies@hnrlaw.com Attorneys for Defendant Andersen Co. (Andersen-India)
Glen M. Boudreaux **VIA WEBSITE** BOUDREAUX, LEONARD & HAMMOND, P.C. Two Houston Center 909 Fannin, Suite 2350 Houston, TX 77010 713/757-0000 713/757-0178 (fax) gboudreaux@boudreauxleonard.com Attorneys for Defendant Stanley C. Horton	

EXHIBITS TO THE MOTION OF DEFENDANT CANADIAN IMPERIAL BANK OF COMMERCE FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

Exhibit 1.....CIBC 2002 Annual Report (excerpts)

Exhibit 2.....CIBC World Markets Corp. Analyst Reports (sample reports)

Exhibit 3.....Enron-related prospectuses and registration statements (sample statements)

Exhibit 4.....Cited Canadian case law

The Exhibit(s) May

Be Viewed in the

Office of the Clerk